

JOHN ROSS, JR.  
v.  
ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-51-A

Decided October 20, 1989

Appeal from a decision of the Muskogee Area Director, Bureau of Indian Affairs, declining to take land in trust for the benefit of an individual Indian.

Vacated and remanded.

1. Board of Indian Appeals: Jurisdiction--Indians: Lands: Trust Acquisitions

The approval of requests to acquire land in trust status for an Indian tribe or individual is committed to the discretion of the Bureau of Indian Affairs. In reviewing such decisions, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Lands: Trust Acquisitions

When the Bureau of Indian Affairs reviews a request to acquire land in trust status for an Indian tribe or individual, it is required to consider the factors listed in 25 CFR 151.10. Proof of the Bureau's consideration of the factors it relies upon to deny a trust acquisition application must appear in the administrative record.

APPEARANCES: John Ross, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant John Ross, Jr., challenges a December 22, 1988, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director;

BIA), declining to take land in trust for appellant's benefit. For the reasons' discussed below, the Board vacates that decision and remands this case to the Area Director for further proceedings

### Background

Appellant is a Cherokee Indian of 4/4 degree Indian blood. By letter of July 20, 1986, he applied to the Tahlequah Agency, BIA, to have taken into trust a 1-acre parcel of land in Rogers County, Oklahoma, which he owned in fee status. Appellant stated:

This land is adjacent to my one acre that has been deeded to Cherokee Nation in order for my house to be built. As I do not pay taxes on that acre, I am seeking to have this parcel of land untaxed.

As a full-blood, I believe it is my right to have non-taxed land. I should have immunity from state taxes because of federal statutes and treaties protecting my rights.

By memorandum of July 21, 1988, the agency recommended to the Area Director that appellant's trust acquisition request be approved. On December 22, 1988, the Area Director disapproved the request, stating in part:

As set forth in the regulations for trust acquisitions, one of the factors to be considered is the degree to which you need assistance in handling your affairs. The information contained in your application does not indicate the need for the protection and services that would be realized from the trust status of this property. In line with the current policy of this office to acquire in trust status for individuals only those properties which were removed from restricted trust status to permit participation in the mutual-help housing program, and after considering all of the factors involved, it is our decision to disapprove your application.

By letter of January 12, 1989, appellant filed a notice of appeal and request for reconsideration with the Area Director. On February 17, 1989, the Area Director denied appellant's request for reconsideration and stated that he was forwarding the appeal to the Assistant Secretary - Indian Affairs. The letter stated in part:

The statutory provisions of the acts authorizing trust acquisitions were not intended to permit individuals to take advantage of the shield of trust and resulting tax-exemption but were intended as a means of protection to individuals to enable them to make a livelihood without endangering the livelihood through the loss of their lands. It appears you have managed your affairs for years and have sufficient ability and experi-

ence to enable you to protect your property so as to prevent loss of same or the benefits thereof. While we appreciate your concern for your family and your desire for the government to supervise your property, we are of the opinion that other means of insuring this protection would be more beneficial.

The appeal was transmitted to the Washington, D.C., office of BIA and was pending on March 13, 1989, the date new appeals regulations for BIA and the Board took effect. See 54 FR 6478 and 6483 (Feb. 10, 1989). It was transferred to the Board on May 16, 1989, for consideration under the new procedures. The Board docketed the appeal on June 6, 1989, following receipt of the administrative record. Only appellant filed a brief.

### Discussion and Conclusions

[1] In several recent decisions, the Board has discussed its role in reviewing BIA decisions concerning the acquisition of land in trust status. See, e.g., Eades v. Muskogee Area Director, 17 IBIA 198 (1989); City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989). In City of Eagle Butte, the Board observed that such decisions are committed to BIA's discretion and that the Board does not have jurisdiction to substitute its judgment for BIA's. Cf. State of Florida v. United States Department of the Interior, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986). The Board concluded, however, that it does have authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority. 17 IBIA at 195-196, 96 I.D. at 330, and cases cited therein.

Under City of Eagle Butte, the Board must consider whether, in denying appellant's application, BIA properly followed the procedures set out in 25 CFR Part 151. 25 CFR 151.10 requires BIA to consider a number of factors in evaluating trust acquisition requests:

- (a) The existence of statutory authority for the acquisition of land in trust status and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;
- (c) The purposes for which the land will be used;
- (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

[2] With respect to BIA's analysis of these factors, the Board stated in City of Eagle Butte, 17 IBIA at 196-197, 96 I.D. at 331:

Proof that these factors were considered must appear in the administrative record. Because the final decision on whether or not to acquire land in trust status is committed to BIA's discretion, there is no requirement that BIA reach a particular conclusion as to each factor. See also State of Florida, 768 F.2d at 1256: "The regulation does not purport to state how the agency should balance these factors in a particular case, or what weight to assign to each factor." In order to avoid any allegation of abuse of discretion, however, BIA's final decision should be reasonable in view of its overall analysis of the factors listed in section 151.10.

The Board further noted that a trust acquisition request may be denied on the basis of an analysis of only some of the factors, if BIA's analysis shows that those factors weighed heavily against the trust acquisition. 17 IBIA at 197, 96 I.D. at 331, n.3.

In this case, the record does not reflect BIA's analysis of the factor relied upon to deny appellant's request, i.e., his lack of need for assistance in handling his affairs (subsection 151.10(d)), or any of the other factors listed in section 151.10. <sup>1/</sup> The only statements concerning appellant's need for assistance appear in the Area Director's December 22, 1988, decision and February 17, 1989, letter; and these contain no explanation of how his conclusion was reached. The Board finds that the administrative record does not contain the necessary proof that the relevant factors were considered. Cf. Eades, supra.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 22,

---

<sup>1/</sup> The Dec. 22 decision noted that it was "the current policy of this office to acquire in trust status for individuals only those properties which were removed from restricted trust status to permit participation in the mutual-help housing program." The Board is unaware of any published BIA policy statement to this effect.

1988, decision of the Acting Muskogee Area Director is vacated, and this case is remanded for further proceedings.

---

Anita Vogt  
Administrative Judge

I concur:

---

Kathryn A. Lynn  
Chief Administrative Judge